

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
LIBRARY OF CONGRESS
Washington, D.C.

**In the Matter of:
DETERMINATION OF ROYALTY
RATES AND TERMS FOR MAKING
AND DISTRIBUTING
PHONORECORDS
(*PHONORECORDS IV*)**

**Docket No. 21-CRB-0001-PR
(2023-2027)**

**THE SERVICES' EMERGENCY MOTION FOR LIMITED MODIFICATION TO
PHONORECORDS IV PROTECTIVE ORDER**

Spotify USA Inc. (“Spotify”), Amazon.com Services LLC (“Amazon”), and Pandora LLC (“Pandora”)¹ submit this motion for a limited modification to the protective order in this proceeding (“Protective Order”).² Specifically, they request that any outside counsel representing both the Copyright Owners in *Phonorecords IV* and the Mechanical Licensing Collective (the “MLC”) be required to execute an attestation or otherwise be screened from access to the Services’ underlying accounting and financial data, including the documents and information they have been ordered to produce by May 10, 2022.³ In other words, Copyright Owners’ MLC counsel may access the Services’ confidential accounting information only if, in the context of this proceeding, they execute an attestation, to be included as Exhibit B to the Amended Protective Order, that they

¹ Google LLC and Apple Inc. join in requesting the relief sought by this motion, as the concerns addressed herein would apply equally with respect to future MLC audits of the services, if any.

² The operative Protective Order was amended on November 4, 2021. *See* Dkt. No. 25908. It has since been modified by the Copyright Royalty Judges (the “Judges”) to limit access to Broadcast Music, Inc.’s (“BMI”) license agreements to any outside counsel directly involved in negotiating BMI license agreements. *See Order Granting in Part Broadcast Music, Inc.’s Motion for a Limited Modification to the Protective Order*, Dkt. No. 21-CRB-0001-PR (2023-2027) (Mar. 23, 2022).

³ Copyright Owners’ rebuttal requests for production and interrogatories may also fall within the scope of this motion, as they request additional detailed accounting information.

will not participate in or provide advice with respect to any forthcoming MLC audits⁴ that might be initiated during the course of this proceeding, up to issuance of a Final Determination.⁵

In connection with the Judges' April 26, 2022 Order on Copyright Owners' Motion to Compel Production of Documents and Information Concerning the Services' Rate Proposals ("MTC Order"), [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Without the Services' requested limitation to the Protective Order, Copyright Owners' outside counsel who currently represent the MLC, and likely will represent the MLC in the future, will be able to use the extensive accounting and financial data information produced in this proceeding in connection with MLC-related matters, including most directly to influence the course of the forthcoming MLC audit process. This risks significantly prejudicing the Services, inasmuch as Copyright Owners' outside counsel, including in particular Mr. Semel, is also counsel for the MLC, and would necessarily conduct his MLC work with knowledge of the sensitive and restricted accounting and financial materials obtained in the *Phonorecords IV* proceeding. Such

⁴ [REDACTED]

⁵ Execution of an attestation would be a memorialization of the relief the Judges' crafted in response to the BMI Order. Although the Services prefer the inclusion of an attestation, the Judges may deem it unnecessary and order identical screening procedures (absent a formal attestation), as with the BMI Motion.

access contradicts the MMA's qualified (or independent) auditor provision, which is designed to ensure an objective and confidential MLC audit process. Here, Mr. Semel will have the opportunity to form opinions, or worse misinterpretations, based on the accounting and financial data the Services are producing and subconsciously deploy that in the course of advising the MLC. As a result of this very real possibility, Copyright Owners should be required to screen outside counsel that advises the MLC, particularly in the context of any forthcoming MLC audits, or otherwise attest that they will not participate in or provide advice with respect to any MLC audit.

The Judges recently granted a similar screening request made in this proceeding on behalf of Broadcast Music, Inc. ("BMI").⁶ Although the Services respectfully disagree with the Judges' ultimate conclusion with respect to BMI's Motion for Protective Order ("BMI Motion"), they agree with the underlying principles of the order, which should be neutrally applied, and potentially applied with significantly more force to the circumstance addressed by this motion. While the Services do not doubt that Mr. Semel, or any other similarly-situated outside counsel, will attempt in good faith to comply with the Protective Order's provision prohibiting outside counsel from using information received during a CRB proceeding for any other purpose, the Judges' ruling on the BMI Motion dictates a consistent application of screening procedures to ensure full compliance with the Protective Order. And the premise of that order was that the provisions of the Protective Order are insufficient to ensure that counsel involved in multiple

⁶ See *Order Granting in Part Broadcast Music, Inc.'s Motion for a Limited Modification to the Protective Order*, Dkt. No. 21-CRB-0001-PR (2023-2027) (Mar. 23, 2022). The relief the Services seek is effectively the same as what was granted in connection with the BMI Motion, with the addition of formal attestation. As with the BMI licenses, Copyright Owners would be required to implement measures to segregate the underlying accounting and financial materials subject to the MTC Order, and to ensure that screened outside counsel (that have not executed the attestation) do not have access to those materials. Copyright Owners must also ensure that all individuals with access to the underlying accounting and financial materials are aware that they are prohibited from sharing or discussing the substance and content of those materials with screened outside counsel.

matters implicating the same information could reliably be expected not to use probative information received in this proceeding in connection with another matter.⁷ That consideration is squarely present here: the Music Modernization Act (“MMA”) establishes elaborate provisions for *independent* qualified auditors, and it is critical that CRB counsel not be put in a position in which the rate-setting discovery process could effectively amount to a pre-audit of the digital services.

For all these reasons, the Services request that the Judges modify the Protective Order to limit access to their sensitive and proprietary accounting and financial data from any outside counsel that advises or may advise the MLC, including in the course of an audit. The Services are working diligently and will produce the relevant documents and information subject to the Judges’ recent MTC Order on May 10, 2022, to the extent such documents exist.⁸ However, given the short timeframe for production and significant prejudice that may result absent the proper screening procedures or attestation, the Services submit this request as an emergency motion. Pending resolution of the motion, it respectfully requests the Judges provide interim relief **on or before the Services’ May 10, 2022 production**, to prevent Mr. Semel and any other similarly-situated outside counsel from accessing the documents, unless they attest to not participating in or advising with respect to any MLC audits.

⁷ See *id.* at 2-3 (“BMI does not suggest that such counsel would intentionally ignore existing requirements in the Protective Order that restricted material be used solely for the purpose of this proceeding but rather observes the difficulty of compartmentalizing knowledge once it is gained.”). The relief sought by the Services here is effectively the same as the relief requested by BMI and granted by the Judges in their most recent order. See *id.* at 3-4. The only difference is that Spotify explicitly asks the Judges to modify the Protective Order to add an attestation that Copyright Owners’ MLC counsel—who otherwise cannot view the relevant documents—may obtain access to the services’ sensitive accounting information in this proceeding if they agree not to participate as counsel or advise the MLC in any MLC audit during the course of the proceeding. The attestation embodies the exact same commitment the Judges required of counsel for the Services who received BMI agreements in discovery.

⁸ See *Order on Copyright Owners’ Motion to Compel Production of Documents and Information from Services Concerning Their Rate Proposals*, Dkt. No. 21-CRB-0001-PR (2023-2027) (April 26, 2022); see also 37 C.F.R. § 303.7 (computing the time for delivering documents by an order of the Copyright Royalty Judges).

ARGUMENT

In evaluating proposed modifications to protective orders, the Judges balance the risk associated with disclosure of the restricted material with the risk that a party will be impaired in its ability to litigate its claims. *See Order Granting in Part Broadcast Music, Inc.'s Motion for a Limited Modification to the Protective Order*, Dkt. No. 21-CRB-0001-PR (2023-2027) (Mar. 23, 2022); *see also Order Granting in Part Motion for Access to the Restricted Phonorecords III Determination and Certain Restricted Phonorecords III Testimony*, Dkt. No. 21-CRB-0005-WR (2021-2025) (Sept. 13, 2019). Applying that standard here, good cause exists to modify the Protective Order because failure to do so would be highly prejudicial to the Services, while the Copyright Owners would simultaneously not be prejudiced by the limited modification.

First, disclosing the sensitive accounting and financial data in connection with the MTC Order would prejudice the Services. Pursuant to the Judges' MTC Order, the Services have been ordered to produce extremely granular accounting and financial data that supports its rate proposal in this proceeding, *e.g.*, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

It would be highly prejudicial to the Services, one or more of which may inevitably be audited by the MLC in the coming weeks, if Mr. Semel, or any other counsel advising MLC, were to have access to the accounting and financial materials subject to the order. Based on the data

⁹ *See Order on Copyright Owners' Motion to Compel Production of Documents and Information from Services Concerning Their Rate Proposals*, Dkt. No. 21-CRB-0001-PR (2023-2027) (April 26, 2022), at 33-40.

being provided, MLC counsel representing Copyright Owners in this proceeding will undoubtedly form opinions about which services to audit, for what periods, and with what focus. Armed with knowledge of the Services’ granular data, data repositories, queries, and systems, MLC counsel would be in a position to shape and influence the forthcoming MLC audit—an outcome expressly at odds with the MMA.

The MMA contemplates that the MLC audits will be conducted by third-party, independent, qualified auditors to mitigate their bias and preserve confidentiality of the underlying information. The MLC may audit a digital service provider, but that “the audit shall be conducted by a qualified auditor,” defined as “an independent, certified public accountant” who “shall perform the audit . . . according to generally accepted auditing standards and subject to applicable confidentiality requirements . . .” 17 U.S.C. § 115(d)(4)(D); 17 U.S.C. § 115(e)(25). Part of the reason the MLC engages an independent auditor in this context is to ensure that outside counsel, including Mr. Semel, is neither directing the auditor nor privy to the digital service’s confidential information uncovered during the audit. However, if Mr. Semel (or any other outside counsel advising the MLC) were to receive the Services’ accounting information during the course of the *Phonorecords IV* proceeding that would undermine the express statutory provisions governing the MLC audit process.

Even with outside counsel’s best efforts to strictly abide by the disclosure provisions of the Protective Order, there is a clear and identifiable risk of prejudice to the Services—namely, that these materials will inadvertently or improperly color the MLC’s audit strategy and process and run afoul of the MMA’s audit provisions designed to protect digital service providers against this

type of circumstance.¹⁰ As the Judges ruled with respect to the BMI license agreements and negotiations, Copyright Owners' outside counsel cannot forget or unsee the information gained in the context of this proceeding.¹¹ The same holds true with respect to Mr. Semel's work advising the MLC on its upcoming audits. And it is exacerbated by the fact that the MLC audits are the first of their kind and will likely run parallel to some extent with the Copyright Owners' review of the sensitive accounting and financial materials subject to the MTC Order. While the Services are fully prepared to comply with the statutory audit provisions in the event that the MLC elects to exercise its audit rights, they should not be subject to what amounts to a pre-audit by MLC's counsel, who would otherwise not have access to these materials in deciding which services to audit, when, and for what periods.

Second, Copyright Owners will not be impaired in their ability to litigate their claims in the *Phonorecords IV* proceeding if a modification similar to the one applied in connection with the BMI Motion is adopted with respect to the Services' accounting and financial materials. Copyright Owners are represented by an extensive team of attorneys, including at least five senior attorneys. The requested modification would only apply to a limited set of outside counsel concerning a very limited set of sensitive documents, thereby imposing minimal if any prejudice on Copyright Owners on this proceeding. As with the Services' outside counsel related to the BMI Motion, Copyright Owners will be able to share the otherwise screened documents with any

¹⁰ In the course of this proceeding, Copyright Owners have demonstrated they are able to access the Services' data and information as it is provided to the MLC without any notice to the Services. *See* Services Motion For Protective Order To Prevent Circumvention of Discovery Rules With Respect to Data in Possession of the MLC (No. 25609), Dkt. No. 21-CRB-0001-PR (2023-2027). Mr. Semel, and potentially other counsel representing Copyright Owners here, have the means to abuse their direct access and representation of the MLC.

¹¹ *Order Granting in Part Broadcast Music, Inc.'s Motion for a Limited Modification to the Protective Order*, Dkt. No. 21-CRB-0001-PR (2023-2027) (Mar. 23, 2022), at 2.

attorneys that do not directly advise or otherwise plan to advise the MLC, as well as Copyright Owners' experts. Those individuals will be able to make use of the underlying accounting and financial data the Services have been ordered to produce and incorporate into Copyright Owners' case as they see fit. Balancing the respective risks, good cause exists to apply a limited screen similar to the screen applied to the Services' ability to view the BMI license agreements.¹²

The Services' narrow modification will serve to protect their interests in the context of any potential MLC audits, while at the same time not substantially or unduly impair the Copyright Owners' ability to litigate this proceeding. Moreover, the relief requested here is no different than what the Judges ordered with respect to the BMI Motion. To the extent Services' counsel had to forswear any non-litigation related direct participation in negotiations with BMI in order to receive BMI licenses under the Protective Order in this proceeding, MLC's counsel should have to forswear any representation of MLC in connection with audits, outside of litigation, if they receive access to the Services' relevant accounting and financial information during the course of this proceeding.

* * *

For the foregoing reasons, the Services respectfully request that the Judges modify the Protective Order to require that Copyright Owners' MLC counsel either attest to not participating in or advising the MLC in connection with any forthcoming MLC audit, or screen any outside counsel that advises or will advise the MLC during the course of this proceeding from the underlying accounting and financial materials the Services plan to produce in compliance with the

¹² *Id.*

MTC order. In the interim, the Services also request that the Judges issue a temporary stay such that Mr. Semel and any other similarly-situated outside counsel cannot access the Services' underlying accounting and financial documents and information, until the pending Motion has been resolved or they formally attest to not participating in or advising with respect to the MLC audit process.

DATED: May 6, 2022

Respectfully submitted,

By: /s/ Joseph R. Wetzel
Joseph R. Wetzel (Cal. Bar No. 238008)
Andrew M. Gass (Cal. Bar No. 259694)
Ivana Dukanovic (Cal. Bar No. 312937)
LATHAM & WATKINS LLP
505 Montgomery Street
San Francisco, California 94111, Suite 2000
Tel.: (415) 391-0600
joe.wetzel@lw.com
andrew.gass@lw.com
ivana.dukanovic@lw.com

– and –

Sarang Vijay Damle (D.C. Bar No. 1619619)
LATHAM & WATKINS LLP
555 Eleventh Street, NW, Suite 1000
Washington, DC 20004
Tel.: (202) 637-2200
sy.damle@lw.com

– and –

Allison L. Stillman (N.Y. Bar No. 4451381)
LATHAM & WATKINS LLP
1271 Avenue of the Americas
New York, NY 10020
Tel.: (212) 906-1200
alli.stillman@lw.com

Counsel for Spotify USA Inc.

DATED: May 6, 2022

By: /s/ Joshua D. Branson
Joshua D. Branson (D.C. Bar No. 981623)
Scott H. Angstreich (D.C. Bar No. 471085)
Aaron M. Panner (D.C. Bar No. 453608)
Leslie V. Pope (D. C. Bar No. 1014920)
KELLOGG, HANSEN, TODD, FIGEL, &
FREDERICK, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
Tel.: (202) 326-7900
Fax: (202) 326-7999

Counsel for Amazon.com Services LLC

DATED: May 6, 2022

By: /s/ Benjamin E. Marks
Benjamin E. Marks (N.Y. Bar No. 2912921)
Todd Larson (N.Y. Bar No. 4358438)
Rachel M. Kaplowitz (N.Y. Bar No. 5765433)
David J. Bier (N.Y. Bar No. 5773361)
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
Tel: (212) 310-8000
Fax: (212) 310-8007
benjamin.marks@weil.com
todd.larson@weil.com
rachel.kaplowitz@weil.com
david.bier@weil.com

Counsel for Pandora Media, LLC

Proof of Delivery

I hereby certify that on Friday, May 06, 2022, I provided a true and correct copy of the The Services' Emergency Motion for Limited Modification to Phonorecords IV Protective Order [Public] to the following:

Powell, David, represented by David Powell, served via E-Service at davidpowell008@yahoo.com

Joint Record Company Participants, represented by Susan Chertkof, served via E-Service at susan.chertkof@riaa.com

UMG Recordings, Inc., represented by Steven R. Englund, served via E-Service at senglund@jenner.com

Zisk, Brian, represented by Brian Zisk, served via E-Service at brianzisk@gmail.com

Johnson, George, represented by George D Johnson, served via E-Service at george@georgejohnson.com

Google LLC, represented by Gary R Greenstein, served via E-Service at ggreenstein@wsgr.com

Apple Inc., represented by Mary C Mazzello, served via E-Service at mary.mazzello@kirkland.com

Warner Music Group Corp., represented by Steven R. Englund, served via E-Service at senglund@jenner.com

Copyright Owners, represented by Benjamin K Semel, served via E-Service at Bsemel@pryorcashman.com

Sony Music Entertainment, represented by Steven R. Englund, served via E-Service at senglund@jenner.com

Signed: /s/ Joseph Wetzel